SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

315 U.S. 781

No. 836

KARL HOBLITZELLE,

Appellant,

vs.

CITY OF UNIVERSITY PARK, ET AL.

APPEAL FROM THE COURT OF CIVIL APPEALS FOR THE [illegible] SUPREME JUDICIAL DISTRICT OF THE STATE OF TEXAS.

MOTION FOR LEAVE TO FILE STATEMENT AS TO JURISDICTION AND STATEMENT AS TO JURISDICTION.

DAVID A. FRANK,
Counsel for Appellant.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 836

KARL HOBLITZELLE,

Appellant,

vs.

CITY OF UNIVERSITY PARK, ET AL.

Appellees.

MOTION FOR LEAVE TO FILE JURISDICTIONAL STATEMENT.

To the Honorable Supreme Court of the United States:

Comes now Karl Hoblitzelle, appellant herein, and moves the court to allow the filing herein of a separate typewritten statement hereto attached disclosing the basis on which it is contended that this Court has jurisdiction on appeal to review the judgment or decree in question and in this connection represents to the court that appellant mistakenly took the view that the application for appeal complied with the rule which has since been particularly called to counsel's attention by the Clerk of this Court.

Copy of this motion and statement has been presented to the Honorable Percy Fewell and his consent to the filing of this motion is indicated herewith.

Respectfully submitted,

DAVID A. FRANK,

Counsel for Karl Hoblitzelle, Appellant.

Copy of above motion and written statement therein referred to has been received by me and it is hereby agreed that such motion may be granted and said statement filed.

PERCY C. FEWELL,

Counsel for Appellees.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 836

KARL HOBLITZELLE,

vs. *Appellant,*

CITY OF UNIVERSITY PARK, ET AL.

Appellees.

STATEMENT AS TO JURISDICTION.

To the Honorable the Supreme Court of the United States:

Comes now Karl Hoblitzelle, Appellant, herein and in compliance with the rules and in addition to the application heretofore filed in the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas, reference to which is hereby made, files this statement disclosing the basis upon which it is contended that this Court has jurisdiction upon appeal to review the judgment of the Court of Civil Appeals of such district and for such statement says:

Statement.

This is a suit in which Karl Hoblitzelle, Appellant, invoked the Equity powers of the State District Court of Dallas County, Texas, to enjoin the City of University Park, its Mayor, City Council and Chief of Police, from interfering with the erection of a business building approximately 100 feet front by 90 feet in depth upon two lots

about two hundred feet square at the North East corner of Preston Road and St. Andrews Drive, which latter street is the South boundary of University Park and the North boundary of Highland Park, said towns being suburbs of the City of Dallas.

The injunction, and supporting Mandamus, were asked on the ground that the action of the City authorities in refusing a building permit was arbitrary and unreasonable and amounted to a deprivation of plaintiff's property without due process of Law and denied to Plaintiff the Equal Protection of the Law, contrary to the Fourteenth Amendment to the Constitution of the United States.

Upon a trial in the District Court, defendants demanded a jury, and, at the conclusion of the evidence, the Court submitted but one question to the Jury, that is whether such action of defendants in denying to plaintiff a permit to build a business building upon his said lot was unreasonable or arbitrary as those words were defined in the charge. To this issue, the Jury answered "Yes," and judgment was entered upon said verdict, in accordance therewith, awarding injunction and including Mandamus to defendants to issue the permit (R. 33).

This judgment was appealed to the Court of Civil Appeals of the Fifth Supreme Judicial District of Texas, at Dallas, which court, in a written opinion, found at page 45 of the Transcript filed herein reversed and rendered the judgment of the trial court on the ground that the findings of the Zoning Board rather than the verdict of the Jury as to the reasonableness of the action of the City shall control.

This is the issue to be decided by this Court. In other words, when a zoning board has acted, is that action final or its reasonableness subject to review?

In due time, motion for rehearing was filed and overruled; application for writ of error to the Supreme Court of

Texas was filed (R. 55) and denied (R. 104), motion for rehearing was filed, and upon being overruled, Appellant Karl Hoblitzelle presented application for appeal to Honorable Joel R. Bond, Chief Justice of the Court of Civil Appeals (R. 1), which appeal was allowed and bond for $1,000.00 for cost of appeal was fixed (R. 3). Bond was duly filed with the Clerk of the Court of Civil Appeals (R. 4). Pertinent parts of the Record, including Praecipe, were prepared by Appellant and presented to the Clerk (See Transcript). Counsel for appellee, in lieu of filing request for additional instruments, undertook to and did re-write the Transcript, which thereupon was agreed to by both parties and, proper certificate having been affixed by the Clerk of the Court of Civil Appeals, it was duly forwarded to the Supreme Court.

a. The question involved does not depend upon any statute. The validity of the zoning ordinance is not in question, but only the manner of administration of the ordinance.

This Court has jurisdiction of this case under Section 344 of Title 28 of the United States Code for the reason that, as above pointed out, a final judgment of the Court of Civil Appeals, of which Appellant complains, was approved by the Supreme Court of Texas, the highest Court of the State, which thereafter overruled a motion for rehearing thus sending the case back to the Court of Civil Appeals where the appeal was allowed by the Chief Justice to this Court.

The Statute of Texas, under which the city passed its zoning ordinance is Revised Civil Statutes, Article 1175, Section 26, giving cities the right 'to divide the city in zones or districts, and to regulate the location, size * * * bulk and use of buildings within such zones or district * * *,,,

No attack is here made upon the validity of the statute or the ordinance other than that such statute, ordinance

and practice thereunder, as interpreted by the zoning board and the Court of Civil Appeals, is repellant to the Fourteenth Amendment to the Constitution of the United States, as heretofore complained of herein, and as set out in our application for appeal.

b. No Statute of the State, Statute or Treaty of the United States is called in question.

c. The date of the judgment in the District Court of Dallas County was July, 1940; the date of the opinion in the Court of Civil Appeals was March 15, 1941 (150 S. W. 2d 169); the date of overruling motion for rehearing in the Court of Civil Appeals was April 19, 1941; the date of denial of application for writ of error in Supreme Court of Texas June 11, 1941, and the date of overruling motion for rehearing in that Court was July 9, 1941; the date of presentation and allowance of appeal by the Honorable Joel R. Bond, Chief Justice of the Court of Civil Appeals, was September 24, 1941 (R. 3).

The Federal question involved here, to wit, whether an arbitrary or unreasonable denial of a permit to erect a business building in a business district denies to appellant the Equal Protection of the Law and deprives him of his property without due process of Law, was raised in Plaintiff's original petition and has been insisted upon in every hearing in every court in which this case has been presented and is herewith and hereby invoked.

It is conceded that in the reasonable exercise of the police power, reasonable classification may be freely applied and that there can be reasonable regulation, not violative of the Constitution. *Adams* v. *Milwaukee,* 228 U. S. 572, 57 L. Ed. 971, 33 Sup. Ct. Rep. 610; *Miller* v. *Wilson,* 236 U. S. 373, 59 L. Ed. 632.

Also that the question raised must be substantial. *Zucht* v. *King,* 260 U. S. 177, 67 L. Ed. 194, 43 S. Ct. 24.

The question is substantial because the property in question, for business purposes, is worth from ten to fifteen thousand dollars and without such building is worthless—that is to say, if a residence or apartment house were built upon the lot it would not rent for enough to pay a return upon the value of improvements alone, and could not be sold, immediately after erection, for as much as the improvements would cost. For that reason, the denial of a permit amounts to confiscation.

This case is on all fours with a Texas case, *City of West University Park* v. *Ellis*, 134 S. W. (2) 1038, which holds that "Whether the power to zone is exercised arbitrarily or not is for the courts to determine as a matter of law." It is also very similar to the case of *Nectow* v. *Cambridge*, 277 U. S. 183, 72 L. Ed. 842, holding that the right to zone "is not unlimited and * * * such restrictions cannot be imposed if they do not bear a substantial relation to the public health, safety, morals or general welfare."

In the latter case, the master found that "no practical use can be made of the land in question for residential purposes because, among other reasons herein related, there would not be adequate return on the amount of any investment for the development of the property."

The evidence was overwhelmingly to the same effect in the case at bar. The Jury could easily have so found. Upon the only issue submitted, it found that the action of putting appellant's property in a residential district and refusing a permit for a business building was unreasonable or arbitrary.

Ever since the decision of this Court in *Euclid* v. *Ambler*, 272 U. S. 365, 71 L. Ed. 303, courts, including this Court, have been pointing out that while, under the Police Power, zoning boards have the right to regulate yet such right is subject to the test of reasonableness and such test will

be applied by the courts. Otherwise to hold would give the board, a legislative body, the power to disregard constitutional provisions giving protection to the individual. *Dobbins* v. *Los Angeles,* 195 U. S. 223, 25 Sup. Ct. Rep. 20, 49 L. Ed. 169.

Its determination of what is a proper exercise of its police powers is not final or conclusive, but is subject to the supervision of the courts." *Lawton* v. *Steele,* 152 U. S. 133, 38 L. Ed. 385.

This Court has held that the power to interfere by zoning regulations with the general rights of the land owner is not unlimited and that, under the guise of police power, the legislature may not impose unnecessary and unreasonable restrictions upon the use of private property. *Washington* v. *Roberge,* 278 U. S. 120, 73 L. Ed. 213, and authorities cited. Also, *Nashville* v. *Walters,* 294 U. S. 415, 79 L. Ed. 955.

It is our understanding that if this Court considers there is merit in our appeal, we will be permitted to file complete brief upon the questions involved. It is not our intention, by attempting here to point out the issue involved herein, to waive the errors assigned in connection with our appeal.

Respectfully submitted,

DAVID A. FRANK,
Counsel for Appellant, Karl Hoblitzelle.

EXHIBIT "A".

Opinion of Court of Civil Appeals in the Case.

No. 13150.

CITY OF UNIVERSITY PARK ET AL.

v.

HOBLITZELLE.

Decided March 15, 1941.

Rehearing Denied April 19, 1941.

Reported 150 S. W. (2d) 169.

BOND, *Chief Justice.*

Karl Hoblitzelle, owner of property in University Park, a municipal corporation, was denied a permit to erect a brick building 100 feet wide, on lots 1 and 2, block B, to front on Preston Road and extend back, flush with St. Andrews Drive, 90 feet, to be used as retail business stores, in violation of the terms of the zoning ordinances of said City. These lots were originally laid off by investors to front on St. Andrews Drive, and designated and zoned as single residence lots, all improvements thereon to face that street, or drive, and set back 30 feet from the south line. These limitations and restrictions, affecting the lots, were recognized, observed and maintained at the time of Hoblitzelle's purchase of the property. Later, the city amended the ordinances to allow the building of apartment houses.

St. Andrews Drive, extending east and west, being the southern boundary of said City and the northern boundary of Highland Park, another municipal corporation, is exclusively a residential street. Preston Road is also a residential street, extending north through University Park and south through Highland Park to the City of Dallas, being the principal highway through the two cities, and be-

yond. Authorities of University Park have never extended permits for the erection of buildings to be used for business on St. Andrews Drive, and none on the east side of Preston Road; however, on the west side of Preston Road and immediately north of Mr. Hoblitzelle's property, several buildings have been erected and used for business; and south, across St. Andrews Drive, facing Preston Road, the authorities of Highland Park have recently granted Mr. Hoblitzelle and others the privilege of developing that block, about 214 feet along Preston Road, for business enterprises; and still further south, and west of Preston Road, in Highland Park, is located an extensive urban business section—Highland Park Village.

The City of University Park has a duly elected and qualified Board of Adjustments, consisting of several members, to whom are referred all such applications as here involved, and has adopted zoning ordinances affecting all property within the city limits. Mr. Hoblitzelle appealed to this Board for the coveted permit and, on being refused, brought this action in a district court for mandamus and injunction, to enable him to use his property in a manner designated by him for business, contending that the property is located within a business district, thus the action of the city authorities, in refusing his application, was unreasonable and arbitrary. The cause was submitted to a jury and on findings, in effect, that the action of the city authorities in denying Hoblitzelle a permit was "unreasonable or arbitrary," a writ of mandamus and injunction was granted, compelling the City to grant the permit, and restraining said authorities from interfering with Hoblitzelle's erection of his building.

(1-3) The ordinances and law applicable to the zoning of property and accessory buildings by the City of University Park, and particularly in the immediate vicinity of the property here involved, have recently been cited and discussed by this Court in Connor *v.* University Park, 142 S. W. (2d) 706, in which we expressly held that the ordinances of said City are valid; thus, considering the attack there made, that the zoning restrictions limited to homes are unreasonable or arbitrary, therefore void as to the

property here involved, it was incumbent upon the party to allege and prove facts which make the application unreasonable; and if its validity is fairly debatable, courts are not authorized to substitute their judgment for that of the governing body of the city. Whether the ordinance excluding business and trades from the residential district is reasonable or unreasonable, or whether the power conferred upon the Board of Adjustments, a governmental agency of the city, is exercised arbitrarily or not, is for the courts to determine as a matter of law. See, also, Lombardo *v.* City of Dallas, 124 Tex. 1, 73 S. W. (2d) 475; Munger, etc., Co. S. W. 1121; Luse et al. *v.* City of Dallas, Tex. Civ. App., 131 S. W. (2d) 1079.

It will serve no useful purpose to cite additional authorities, that the segregation of industries, commercial enterprises, and dwellings to particular districts, prevent congestion of population, secure quiet residential districts, expedite local transportation, facilitate the suppression of disorder, and regulate sanitation. The doctrine is supported by authorities the country over. In Munger *v.* City of Groesbeck, supra (194 S. W. 1123), this court quoted with approval the remarks of the Supreme Court of Minnesota, in the case of Evison *v.* Railway Co., 45 Minn. 370, 48 N. W. 6, 11 L. R. A. 436, which we think are appropriate here: "Much must be left to the judgment and discretion of the city council, and when they have exercised their judgment and discretion in passing an ordinance it is prima facie valid, and, to justify a court in setting aside their action, its unreasonableness, and the want of necessity for it as a measure for the protection of life and property, must be clear, manifest, and undoubted, so as to amount, not to a fair exercise, but an abuse of discretion, or a mere arbitrary exercise of the power of the council."

On consideration of Mr. Hoblitzelle's application, the Board of Adjustments of the City of University Park, exercising the powers granted by the ordinances of said City, denied the application, assigning therefor the following reasons, which we think are fully supported by the record:

"1. There is a two-story brick house on Lot two of said Block 'B' now being used as a single-family dwelling and

no arrangements have been made for removing the same, nor does the appellant offer any assurance that all of said Lot two will not continue to be so used and therefore no part thereof will be available for or used in connection with the proposed business use;

"2. That each and all of Lots 2, 3, 4, 6 and 7 in Block 'B', and lots 7, 8, 9, 10, 11 and 12 in Block 'C' in said Saint Andrews Place Addition are improved and used for single-family dwellings and the houses on each of said lots face Saint Andrews Drive;

"3. That the said houses on Saint Andrews Drive are set back thirty feet or more from the property line facing Saint Andrews Drive while the appellant proposes to set his proposed buildings on the south property line facing Saint Andrews Drive;

"4. That as originally and presently platted the front of Lot one of said Block 'B' is on Saint Andrews Drive with the side line abutting on Preston Road;

"5. That Saint Andrews Drive is a very narrow street, the land being dedicated to public use being only thirty-five feet, which is much less than the width of land usually dedicated to public use as streets in the City of University Park, and the paving thereon is only twenty-six feet in width and a substantial and serious traffic congestion would result if such permit were granted;

"6. That Saint Andrews Place Addition was laid out and platted and so far as it has been improved it has been developed as an exclusively residential district and the platting arrangement and development thereof is improper, impractical and unsuited for business or commercial development;

"7. That if business buildings and commercial uses were permitted on the property in question, it would probably be necessary to widen Preston Road very soon at a very substantial cost to this City;

"8. That a very real and substantial additional traffic hazard would result from the granting of such permit;

"9. That a substantial expense would necessarily be encountered and incurred by the City of University Park for

essential additional police supervision if such permit were granted;

"10. That the installation, operation and maintenance of additional traffic regulations and controls would be essential if such permit were granted;

"11. That greater noises and offensive odors would emanate from the proposed buildings and their proposed use so that the comfort of the surrounding homes would be substantially decreased if the said permit were granted;

"12. That irreparable injury to the present comprehensive zoning plan of this City would result if such permit were granted;

"13. That the public welfare requires that a margin of safety be provided for the preservation of the comprehensive zoning plan of this City and business buildings and business uses on the property in question would forever destroy the required margin;

"14. That the property in question is adapted to the uses permitted in the single-family dwelling district;

"15. That the market value of surrounding residential property would be substantially decreased by reason of the putting of business on the property in question if the said permit were granted;

"16. That the property in question while restricted to the uses permitted in single-family dwelling districts by the zoning ordinance is marketable by a willing seller to a willing buyer at a reasonable and fair price;

"17. That the proposed structure does not meet the requirements of the building code of this City, but counsel for the appellant promises to undertake to amend the plans to meet such requirements;

"18. The property in question is adaptable to and highly desirable for the uses permitted in the apartment district and although the appellant has not requested permission to so use it, such uses would be much less injurious than the presently proposed use."

(4-5) The issue therefore narrows to the inquiry, shall the findings of the Board govern in a matter entrusted by law to their discretion (a purely governmental function), or the findings of the jury be substituted therefor? Courts may determine whether or not it appears that the governing body of a city acted arbitrarily, but when the facts are fairly debatable, legislative judgment of the legally constituted Board must prevail. Manifestly, it cannot be said under this record that appellee established that there were no issuable facts, or that, as a matter of law, there was no basis for the exercise of governmental functions by the Board in denying the permit. Whether a particular ordinance is reasonable or arbitrary presents a question of law for the court and not for the jury; and, in determining the law, the court will have due regard to all the circumstances of the city, the objects sought to be attained and the necessity existing for the ordinance. Indeed, the ordinance may have a detrimental effect on individual property, as in the case here; and we might add that the zoning of Mr. Hoblitzelle's property for homes materially affects the money value of his property, which, perhaps, is not as attractive for homes as for business; but, in the march of progress, private interests must yield to the good of the community. The denial of the permit sought by appellee evidently was intended to promote the public safety, health, prosperity, convenience, morals, and general welfare of the city; there is no evidence to the contrary. Or, if it can be said that the evidence raises the issue of any of the material facts upon which the city authorities refused the permit, then the law delegates to the city authorities, and not to courts or juries, the power and duty of determining the sufficiency of issuable facts in the exercise of a purely governmental function. Paraphrasing the language of Judge Gaines, in the case of Sansom *v.* Mercer, 68 Tex. 488, 5 S. W. 62, 2 Am. St. Rep. 505, he said: "If there is any controversy as to the existence of the facts upon which the Board denied the requested permit, the function of the Board was discretionary, and it cannot be compelled to grant the permit."

It follows that the verdict of the jury cannot serve as the basis for the judgment entered by the trial court directing

the authorities of the City of University Park to issue Hoblitzelle a permit to erect a building to be used in violation of the City's zoning ordinance. The mandamus and injunctive relief should not have been issued, therefore, the orders are dissolved and judgment here rendered for appellants.

Reversed and rendered.

(8122)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 836

KARL HOBLITZELLE,

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CITY OF UNIVERSITY PARK, ET AL.,

Appellees.

MOTION FOR LEAVE TO FILE "APPELLEES' AMENDED OPPOSITION AND MOTION TO DISMISS OR AFFIRM".

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Dallas, Texas,
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SUPREME COURT OF THE UNITED STATES

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No. 836

KARL HOBLITZELLE,

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CITY OF UNIVERSITY PARK, ET AL.,

Appellees.

MOTION FOR LEAVE TO FILE "APPELLEES' AMENDED OPPOSITION AND MOTION TO DISMISS OR AFFIRM".

To the Honorable the Supreme Court of the United States:

Appellees did not oppose Appellant's motion to file a statement, by which he sought to disclose the basis upon which Appellant contends this Court has jurisdiction to review the final judgment in this case, because it was hoped this statement would be helpful to the Court.

However, upon reading the statement Appellees have just discovered the presentation is such as to make an amendment of Appellees' opposing statement necessary and that it states there is a Federal question involved, which Appellees are required to challenge.

WHEREFORE, Appellees, City of University Park, Elbert Williams, Lynn V. Lawther, E. Glenn Martin, Percy C. Fewell, Jack B. Kirvin, and Claude W. Trammel, respectfully move the Court to permit the Appellees' Amended Opposing Statement and Motion to Dismiss or Affirm (tendered herewith) to be filed as though it had been timely presented, as its original motion was, and that this amendment, instead of the original, be printed and Appellees pray that this Motion will be granted.

Respectfully submitted,

PERCY C. FEWELL,
821 Texas Bank Building,
Dallas, Texas,
Counsel for Appellees.

A copy of the above motion and of the Amended Opposition and Motion to Dismiss or Affirm therein referred to has been received by me and it is hereby agreed that such Motion may be granted and Appellees' "Amended Opposition and Motion to Dismiss or Affirm" may be filed as though it had been timely presented.

D. A. FRANK,
Counsel for Appellant.

SUPREME COURT OF THE UNITED STATES

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No. 836

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APPELLEES' AMENDED OPPOSING STATEMENT AND MOTION TO DISMISS OR AFFIRM.

To the Honorable the Supreme Court of the United States:

This case involves the denial by the City of University Park of a permit to erect and use a commercial structure on two lots in violation of a building code, the validity of which is not challenged, and in violation of a Zoning Ordinance restricting the use of one of the lots to the dwelling place of one family, as it is now substantially improved and actually used, and restricting the use of another lot to uses permitted in the apartment district.

A copy of the Opinion of the Court of Civil Appeals of Texas is reported, 150 S. W. (2d) 169. Since Appellant has not complied with the rule requiring the opinion to be made

a part of his petition for appeal, we respectfully refer to the printed opinion and ask forgiveness for making the quotations from it which would not otherwise be necessary in this Motion.

From Appellant's Statement it appears the question presented is:

> "Is the action of the legislative body of a municipality in a zoning ordinance subject to review by the Courts?"

The Court of Civil Appeals of the Fifth Supreme Judicial District of Texas in its opinion in this case has not held against the Appellant on this question. The Opinion states, 150 S. W. (2d) 169, page 171:

> "Whether the ordinance excluding business and trades from the residential district is reasonable or unreasonable, or whether the power conferred upon the Board of Adjustments, a governmental agency of the City, is exercised arbitrarily or not, IS FOR THE COURTS TO DETERMINE as a matter of law." (Capitalization ours.)

Thus, it is manifest the Court from which the appeal is sought, has not held contrary to Appellant's contention, and there is no occasion for review.

The following is quoted from Appellant's Statement:

> "The Federal question involved here, to wit, whether an arbitrary or unreasonable denial of a permit to erect a business building in a business district denies to Appellant the Equal Protection of the Law and deprives him of his property without due process of Law, was raised in Plaintiff's Original Petition and has been insisted upon in every hearing in every Court in which this case has been presented and is herewith and hereby invoked" (page 6 of Appellant's Statement).

The Court of Civil Appeals has not considered nor decided the question as stated nor is the question, as stated, involved.

In making this statement Appellant does not comply with the rules requiring reference to the record. The statement is not supported by and does not conform to the record. This necessitates our asking your Honors' indulgence for references to the record.

The property in controversy is on the east side of Preston Road and on the North side of Saint Andrews Drive.

There is no commercial development of any kind and no business on the East side of Preston Road in the City of University Park (a distance of two miles) and none on the East side of Preston Road in Highland Park (South) except one block. (See testimony of Appellant's witnesses Mr. Harry Maxson, Transcript page 113, lines 19-20, Mr. Frank McNeny, Transcript page 116, lines 25-27, and Appellees' witness Harland Bartholomew (a National Zoning Expert), Transcript page 136, lines 2-3.)

It is a physical uncontroverted fact that a two story brick veneer house on Lot 2 (one of the lots involved here), is being used as the dwelling place of one family and that this lot has never been used for any other purpose.

Lot 1 is vacant. When Mr. Hoblitzelle purchased it, Deed Covenants restricted its use to residential purposes. (See testimony of Appellant's witnesses Harry Maxson page 114, lines 6-7 of the Transcript, and Manning Shannon, Transcript page 131, lines 25-26, Appellant's own testimony, Transcript page 133, lines 15-16.) It has never been used for any commercial purpose.

The commercial property in the Town of Highland Park, South of Lot 1, was owned by Appellant, when it was developed commercially. There is no business directly East, West or North of the property in controversy. (Testimony of Appellant's witness Ted Dealey, Transcript page 112, lines 9 to 12.) (Appellant's testimony, Transcript page 133, lines 11-14.)

Although Appellant proposes to erect commercial buildings facing Preston Road, both lots are platted to face Saint Andrews Drive (Testimony of Appellant's witnesses Fisher, Transcript 119, and Major Wood, Transcript 129, line 18), which was purposely made a narrow street "because the original home builders wanted privacy and didn't want a lot of driving through there" (Appellant's witness Fisher, Transcript page 119, lines 28-32).

It is uncontroverted that Saint Andrews Drive in University Park is and always has been a residential street and entirely free of commercial uses.

The development around the property in controversy is predominately residential—one and two family residences (Harland Bartholomew, Transcript page 134, lines 13-14).

The present commercial facilities are quite adequate and there is no demand for additional commerce in the area in controversy.

Appellant's witnesses:

Ted Dealey, Transcript, page 112, line 11;
Harry Maxson, Transcript, page 113, lines 22-24;
Frank McNeny, Transcript, page 116, lines 23-24;
James Tardy, Transcript, page 122, lines 1-2;
John A. Phelan, Transcript, page 123, lines 19-22.

Witnesses called by Appellee:

Harland Bartholomew, Transcript, page 136, line 1;
H. J. Curtis, Transcript, page 145, lines 6-7;
Harvey G. Smith, Transcript, page 145, lines 15-17;
E. L. Myer, Transcript, page 145, and page 146.

Obviously, Mr. Hoblitzelle, Mr. Ted Dealey and Mr. Mannon B. Shannon, who own property from which they would appreciate a speculative profit, desire to create a new commercial area in a residential district.

The evidence does not raise the question Appellant says is involved.

The use Map of University Park (Transcript, page 148) and the Zoning Map (Transcript, page 147) show that the property involved is not in a business district.

Appellant says this case is on all fours with the case of *City of West University Place* v. *Ellis*, 134 S. W. (2d) 1038, decided by the Supreme Court of Texas. Perhaps his zeal is pardonable, but the facts are contrary to his contention. The same Supreme Court of Texas refused to grant the Writ of Error Appellant sought in this case.

Appellant says this case is similar to the case of *Nectow* v. *Cambridge*, 277 U. S. 183, 72 L. Ed. 842. There is a fundamental legal difference in that Nectow alleged and proved that the restrictions bore no substantial relation to the public health, safety, morals or general welfare. In this case the evidence was exclusively to the contrary, and Appellant failed to make out a *prima facie* case on this point or to raise the issue submitted to the Jury.

In this case the Court of Civil Appeals stated in its opinion, 150 S. W. (2d) 169, pages 171, 172:

> "On consideration of Mr. Hoblitzelle's application, the Board of Adjustments of the City of University Park, exercising the powers granted by the ordinances of said City, denied the application, assigning therefor the following reasons, which WE THINK ARE FULLY SUPPORTED BY THE RECORD:
>
> "1. There is a two-story brick house on Lot two of said Block 'B' now being used as a single-family dwelling and no arrangements have been made for removing the same, nor does the appellant offer any assurance that all of said Lot two will not continue to be so used and therefore no part thereof will be available for or used in connection with the proposed business use;

"2. That each and all of Lots 2, 3, 4, 6 and 7, in Block 'B', and Lots 7, 8, 9, 10, 11 and 12 in Block 'C' in said Saint Andrews Place Addition are improved and used for single-family dwellings and the houses on each of said lots face Saint Andrews Drive;

"3. That the said houses on Saint Andrews Drive are set back thirty feet or more from the property line facing Saint Andrews Drive while the appellant proposes to set his proposed buildings on the south property line facing Saint Andrews Drive;

"4. That as originally and presently platted the front of Lot one of said Block 'B' is on Saint Andrews Drive with the side line abutting on Preston Road;

"5. That Saint Andrews Drive is a very narrow street, the land being dedicated to public use being only thirty-five feet, which is much less than the width of land usually dedicated to public use as streets in the City of University Park, and the paving thereon is only twenty-six feet in width and a substantial and serious traffic congestion would result if such permit were granted;

"6. That Saint Andrews Place Addition was laid out and platted and so far as it has been improved it has been developed as an exclusively residential district and the platting arrangement and development thereof is improper, impractical and unsuited for business or commercial development;

"7. That if business buildings and commercial uses were permitted on the property in question, it would probably be necessary to widen Preston Road very soon at a very substantial cost to this City;

"8. That a very real and substantial additional traffic hazard would result from the granting of such permit;

"9. That a substantial expense would necessarily be encountered and incurred by the City of University Park for essential additional police supervision if such permit were granted;

"10. That the installation, operation and maintenance of additional traffic regulations and controls would be essential if such permit were granted;

"11. That greater noises and offensive odors would emanate from the proposed buildings and their proposed use so that the comfort of the surrounding homes would be substantially decreased if the said permit were granted;

"12. That irreparable injury to the present comprehensive zoning plan of this City would result if such permit were granted;

"13. That the public welfare requires that a margin of safety be provided for the preservation of the comprehensive zoning plan of this City and business buildings and business uses on the property in question would forever destroy the required margin;

"14. That the property in question is adapted to the use permitted in the single-family dwelling district;

"15. That the market value of surrounding residential property would be substantially decreased by reason of the putting of business on the property in question if the said permit were granted;

"16. That the property in question while restricted to the uses permitted in single-family dwelling districts by the zoning ordinance as marketable by a willing seller to a willing buyer at a reasonable and fair price;

"17. That the proposed structure does not meet the requirements of the building code of this City, but counsel for the appellant promises to undertake to amend the plans to meet such requirements;

"18. The property in question is adaptable to and highly desirable for the uses permitted in the apartment district and although the appellant has not requested permission to so use it, such uses would be much less injurious than the presently proposed use."

The Court of Civil Appeals quite properly held that eighteen findings of fact made by the Board of Adjust-

ment (Zoning Appeals) and quoted in the opinion, 150 S. W. (2d) 169, pages 171, 172, are fully supported by this record. Under these findings the police power granted by the applicable State Statutes was legitimately exercised, in consonance with the safety, comfort and other aspects of the Public Welfare, by the City of University Park in restricting the use of Appellant's Lot Number Two to the residential uses for which it is improved and now being used and of Lot Number One to uses permitted in the Apartment District.

Appellant does not refer your Honors to any evidence in this record contrary to these findings.

We respectfully submit that the testimony conclusively establishes and precludes any conclusion other than that the denial of the coveted permit accomplishes the purposes for which the police power could be and was legitimately exercised.

Upon appeal from the Judgment of the Trial Court, your Appellees regarded the controlling questions as being:

> 1. Will the legislative acts of the governing body of the City of University Park in the exercise of the police power lawfully vested in it, prevail against an attack in which Mr. Hoblitzelle failed to offer evidence that the public safety, morals, peace, health, prosperity, comfort, convenience and other aspects of the general welfare are not promoted by the denial of the permit he seeks?
>
> 2. Even if the evidence had been sufficient to make the reasonableness and constitutionality of the acts of the City of University Park fairly debatable, will these acts be sustained by the Courts.
>
> 3. Was it improper for the trial court to issue a Writ of Mandamus requiring the granting of a permit for a structure substantially different from the application considered by the City.

This record does not disclose any Motion by Appellant for directed verdict nor for Judgment *non obstante veredicto*, nor the reservation of any exception to the overruling of such a Motion; Appellant made no Assignments of Error complaining of any act of the trial court.

It is therefore apparent that Appellant can not complain of the submission of this case to the Jury on Special Issues. Manifestly no issues should be submitted unless they are fairly debatable.

In this case the only question answered was one we submit was a question of law for the Court not one of fact for the Jury.

King v. *Guerra* (Tex. Civ. App.) 1 S. W. (2d) 373; Writ refused 13 S. W. (2d) 908;

City of San Antonio v. *Zogheib* (Tex. Sup. Ct.) 101 S. W. (2d) 539;

Max Wulfsohn v. *John Burden*, 150 N. E. 120; 43 A. L. R. 651.

The Court of Civil Appeals answered the first two questions affirmatively, saying:

> "Courts may determine whether or not it appears that the governing body of a city acted arbitrarily, but when the facts are fairly debatable, legislative judgment of the legally constituted Board must prevail. MANIFESTLY, IT CANNOT BE SAID UNDER THIS RECORD THAT APPELLEE ESTABLISHED THAT THERE WERE NO ISSUABLE FACTS, OR THAT, AS A MATTER OF LAW, THERE WAS NO BASIS FOR THE EXERCISE OF GOVERNMENTAL FUNCTIONS BY THE BOARD IN DENYING THE PERMIT. Whether a particular ordinance is reasonable or arbitrary presents a question of law for the court and not for the jury; and, in determining the law, the court will have due regard to all the circumstances of the city, the objects sought to be attained and the necessity existing for the ordinance.

"The denial of the permit sought by appellee evidently was intended to promote the public safety, health, prosperity, convenience, morals, and general welfare of the city; there is no evidence to the contrary. Or, if it can be said that the evidence raises the issue of any of the material facts upon which the city authorities refused the permit, then the law delegates to the city authorities, and not to courts or juries, the power and duty of determining the sufficiency of issuable facts in the exercise of a purely governmental function. Paraphrasing the language of Judge Gaines, in the case of Sansom *v.* Mercer, 68 Tex. 488, 5 S. W. 62, 2 Am. St. Rep. 505, he said: 'If there is any controversy as to the existence of the facts upon which the Board denied the requested permit, the function of the Board was discretionary, and it cannot be compelled to grant the permit.'

"It follows that the verdict of the jury cannot serve as the basis for the judgment entered by the trial court directing the authorities of the City of University Park to issue Hoblitzelle a permit to erect a building to be used in violation of the City's zoning ordinance. The mandamus and injunctive relief should not have been issued, therefore, the orders are dissolved and judgment here rendered for appellants."

(Capitalization ours.)

By failing to tender evidence that the Zoning Classification does not accomplish the purposes for which the Police Power may be and was legitimately exercised, Appellant failed to offer evidence under any proper test of the reasonableness of the governmental acts he challenges.

Therefore, the Judgment of the Court of Civil Appeals of Texas is the only Judgment supported by this record.

The opinion of the Court of Civil Appeals of the Fifth Supreme Judicial District of Texas takes cognizance of Appellant's failure to meet his burden of Proof and recognizes the constitutional division of the government into the legislative, judicial and executive branches. By adherence

to this division, Appellant has not been denied the right of a trial by a Jury, functioning within its lawful province, nor any other element of due process of law, nor equal protection. He has merely been denied the privilege, no one else has, of having a Jury usurp the functions of the legislative body, selected by the governed and charged with the responsibility of classifying all the property within the City under a comprehensive Zoning Plan.

In this holding the Court of Civil Appeals has followed the Constitution of the United States and the rule of law settled by this Honorable Court and the Highest Courts of many States:

Hector N. Zahn and A. E. Ross v. *Board of Public Works of the City of Los Angeles, et al.*, 274 U. S. 325; 71 L. Ed. 1074;

J. C. Hadacheck v. *C. E. Sebastian, Chief of Police of the City of Los Angeles*, 239 U. S. 394; 60 L. Ed. 394;

Standard Oil Company and Sinclair Refining Co. v. *City of Marysville, et al.*, 279 U. S. 582; 73 L. Ed. 856;

Village of Euclid v. *Ambler Realty Co.*, 272 U. S. 365; 71 L. Ed. 303;

Mayor and Aldermen of the City of Knoxville v. *Knoxville Water Co.*, 212 U. S. 1; 53 L. Ed. 371; 29 S. Ct. 148;

Railroad Commission of Texas, et al. v. *Rowan and Nichols Oil Company*, 310 U. S. 573; 84 L. Ed. 1368;

Phelps Dodge Corporation v. *National Labor Relations Board*, 61 S. Ct. 845;

San Diego Land & Town Co. v. *City of National City, et al.*, 174 U. S. 739, 754; 43 L. Ed. 1154; 19 S. Ct. 804;

Joseph Radice v. *People of the State of New York*, 264 U. S. 292, 294; 68 L. Ed. 690, 694;

King, et al., v. *Guerra* (Tex. Civ. App.) 1 S. W. (2d) 373; Writ of Error refused by Supreme Court of Texas;

City of San Antonio v. *Zogheib* (Tex. Sup. Ct.) 101 S. W. (2d) 539;

Marblehead Land Co. v. *Los Angeles*, 47 F. (2d) 528; Writ of Certiorari denied 284 U. S. 634;

Minersville School District v. *Walter Gobitis*, 84 L. Ed. 1375; 309 U. S. 645; 60 S. Ct. 1010; 127 A. L. R. 1493;

Dr. T. V. Connor, Jr. v. *City of University Park* (Tex. Civ. App.) 142 S. W. (2d) 706, Writ refused;

Wulfsohn v. *Burden, Inspector of Buildings of City of Mt. Vernon* (Court of Civil Appeals of New York) 150 N. E. 120;

Minkus, et ux. v. *Pond, et al.* (Supreme Court of Illinois) 158 N. E. 121;

Sunny Slope Water Co. v. *City of Pasadena, et al.*, (Supreme Court of California) 33 P. (2d) 672;

Appeal of Parker (Supreme Court of North Carolina) 197 S. E. 706; 214 N. C. 51;

Wippler, et al., v. *Hohn, et al.* (Sup. Ct. of Missouri), 110 S. W. (2d) 409;

Dowham v. *City Council of Alexandria, Virginia*, 58 F. (2d) 784;

Miller v. *Board of Public Works of the City of Los Angeles* (California Supreme Court) 234 P. 381; 38 A. L. R. 1479;

Pettis, et al., v. *Alpha Alpha Chapter of Phi Beta Pi, et al.* (Supreme Court of Nebraska), 213 N. W. 835;

Bond v. *Cooke, Commissioner of Public Safety, et al.*, 262 N. Y. S. 199;

City of LaCrosse v. *Elbertson* (Supreme Court of Wisconsin), 237 N. W. 99;

West Bros. Brick Co., Inc. v. *City of Alexandria* (Supreme Court of Virginia) 192 S. E. 881;

Hadacheck v. *Alexander, Mayor, et al.* (Supreme Court of California), 147 Pac. 259;

State of Wisconsin ex rel. Chas. Carter v. *Harper*, 33 A. L. R. 269; 182 Wis. 148; 196 N. W. 451.

In the case *The Township of Pine Grove* v. *Edward B. Talcott*, 19 Wallace 666-679, 22 L. Ed. 227, page 232, this Court said:

> "It is said the act is in conflict with the Constitution of the State. It is an axiom in American Jurisprudence that a statute is not to be pronounced void upon this ground, unless the repugnancy to the Constitution be clear and the conclusion it exists INEVITABLE. EVERY DOUBT IS RESOLVED IN SUPPORT OF THE ENACTMENT."
>
> (Capitalization ours.)

The opinion of this Court in the Legal Tender cases, 12 Wallace 457-680, 20 L. Ed. 287, page 305, quotes approvingly, the following language from the opinion in *Commonwealth of Pennsylvania* v. *Smith*, 4 Bin. 117, page 123:

> "It must be remembered that for weighty reasons, it has been assumed as a principle, in construing Constitutions by the Supreme Court of the United States, by this Court, and by every other Court of reputation in the United States that an Act of the Legislature is not to be declared void unless the violation of the Constitution IS SO MANIFEST AS TO LEAVE NO ROOM FOR REASONABLE DOUBT." (Capitals ours.)

The Circuit Court of Appeals, Fifth Circuit in the case of *Elliott, et al.*, v. *El Paso Electric Co., et al.*, 88 F. (2d) 505, certiorari denied 301 U. S. 710, 81 L. Ed. 1363, said 88 F. (2d) 505 #1:

> "* * * A legislative act should not be declared void unless its unconstitutionality APPEARS BEYOND EVERY REASONABLE DOUBT and such ruling

is necessary to the disposition of the case." (Capitals ours.)

The following, copied from the opinion of the Supreme Court of Kentucky in the case of *Fidelity & Columbia Trust Co.* v. *Reeves*, 154 S. W. (2d) 337, #4, page 343:

> "There is another rule upon which the safety of our government and its institutions depend in a considerable degree. We must presume in favor of the validity of a law, UNTIL ITS VIOLATION OF THE CONSTITUTION IS PROVED BEYOND A REASONABLE DOUBT. This rule has maintained since its early pronouncement in Ogden *v.* Saunders, 12 Wheat. 213, 6 L. Ed. 606, and is the rule in this Jurisdiction." (Capitals ours.)

Appellant contends that the Zoning Classification destroys the value of his property. Viewing the evidence liberally in Appellant's favor the most that can be said is that the property presently has a greater speculative value (resulting largely from the restriction of other property) for commercial uses than for the uses permitted under the Ordinance.

Under the Texas Statutes the Appellant waived any issue on the loss of value by failing to request the submission of a Special Issue thereon to the Jury.

Wichita Falls & S. R. Co. v. *Holbrook* (Tex. Sup. Ct.) 125 T. 184, 78 S. W. (2d) 938, Certiorari denied 296 U. S. 618, 80 L. Ed. 439, 56 U. S. Ct. 139;

Ormsby v. *Ratcliffe* (Tex. Sup. Ct.) 1 S. W. (2d) 1084.

But a reduction in value resulting from the legitimate exercise of the police power does not violate the Fourteenth Amendment to the Constitution.

J. C. Hadacheck v. *C. E. Sebastian, Chief of Police of the City of Los Angeles*, 239 U. S. 394, 60 L. Ed. 394;

Marblehead Land Co., et al. v. *City of Los Angeles* (C. C. A. Ninth Circuit) 47 F. (2d) 528, Syllabus 10,

p. 534, Petition for Writ of Certiorari denied 284 U. S. 634, 76 L. Ed. 540, 52 S. Ct. 18;

Brett v. *Building Commissioner of Brookline* (Sup. Ct. Mass.) 145 N. E. 269;

Geneva Investment Co. v. *City of St. Louis* (C. C. A. Eighth Circuit) 87 F. (2d) 83, Writ of Certiorari denied 81 L. Ed. 1345;

American Wood Products Co. v. *Minneapolis*, 21 F. (2d) 440, affirmed 35 F. (2d) 657;

Village of Euclid, Ohio, et al. v. *Ambler Realty Company*, 272 U. S. 365, 71 L. Ed. 303.

Although incorporated separately, University Park is primarily a residential suburb of the City of Dallas. There are no commercial uses in University Park on the east side of Preston Road. Hundreds of families have established their homes five to ten miles from downtown Dallas relying upon an open Preston Road to afford them the one essential and easy means of getting to and from their homes and places of employment.

The case of *Luse* v. *City of Dallas* (Tex. Civ. App.) 131 S. W. (2d) 1079 (writ refused by Supreme Court of Texas) had much more merit but the validity of the ordinance was upheld just as similar classifications have been held valid in *King* v. *Guerra* (Tex. Civ. App.) 1 S. W. (2d) 373 (writ refused), *Lombardo* v. *City of Dallas* (Sup. Ct. Tex.) 73 S. W. (2d) 475, and other cases all over the country.

Luse v. *City of Dallas* (Tex. Civ. App.) 131 S. W. (2d) 1079; Writ refused by Supreme Court of Texas;

American Wood Products Co. v. *City of Minneapolis*, (C. C. A. Eighth Circuit) 35 F. (2d) 657;

Dubin v. *Wich* (Sup. Ct. N. J.) 200 A. 751;

Feraut v. *City of Sacramento* (Cal. Sup. Ct. 269 P. 537;

State ex rel. Banner Grain Co. v. *Houghton* (Sup. Ct. Minn.) 170 N. W. 853;

State of Wisconsin ex rel. Norman Hall, Inc. v. *Gurda* (Sup. Ct. Wis.) 291 N. W. 350;

Heckman v. *City of Independence* (Sup. Ct. Kan.) 274 P. 732;

City of Jackson v. *McPherson* (Sup. Ct. Miss.) 138 So. 604;

Minkus v. *Pond* (Sup. Ct. Ill.) 158 N. E. 121;

West Bros. Brick Co. v. *City of Alexandria* (Sup. Ct. Va.) 192 S. E. 881;

Spencer Sturla Co. v. *City of Memphis* (Sup. Ct. Tenn.) 290 S. W. 608.

Has the Appellant made any showing, either by his petition or statement, that he has probably been denied due process of law or equal protection by a Judgment, which conforms to the Constitution and follows the rules of law settled by this Honorable Court? We think not.

Hector N. Zahn and A. E. Ross v. *Board of Public Works of Los Angeles, et al.*, 274 U. S. 325, 71 L. Ed. 1074;

Standard Oil Co. v. *City of Marysville*, 279 U. S. 582, 73 L. Ed. 856;

Railroad Commission v. *Pacific Gas & E. Co.*, 302 U. S. 388, 58 S. Ct. 334;

Thomas Cusack Co. v. *City of Chicago*, 242 U. S. 526, 61 L. Ed. 475.

Each of Appellants contentions have been either sustained by the holding of the Court of Civil Appeals of Texas in this case, or have been so foreclosed by prior decisions of this Court as not to serve as the basis of an appeal to the Federal Supreme Court from a State court to review a Judgment, which holds that when the validity of a Zoning Classification is fairly debatable the

Judgment of the Court will not be substituted for the legislative act, which must prevail.

Manhattan Life Insurance Company of New York and United States Fidelity & Guaranty Company v. *David Cohen, Independent Executor of the Estate of Jack Cohen, Deceased,* 234 U. S. 123, p. 136, 58 L. Ed. 1245 (second headnote), p. 1254, 1255;

Equitable Life Assurance Society of the United States v. *Cecil Brown, Administrator,* 187 U. S. 308, 47 L. Ed. 190;

New Orleans Water Works Co. v. *Louisiana,* 185 U. S. 336, 345, 46 L. Ed. 936, 941, 22 S. Ct. 691.

We respectfully submit Appellant's Statement does not comply with rule 12 and his petition is so lacking in substance as to be insufficient to serve as a basis for Appeal and the Statement and Petition do not show that the nature of the case and of the rulings of the court was such as to bring this case within the Jurisdictional provisions relied on, nor cite any cases which do, or which appellant believes will, sustain the jurisdiction of this Court.

Rosalyn Zucht v. *W. A. King, et al.,* 260 U. S. 174, 67 L. Ed. 194.

WHEREFORE, Appellees City of University Park, Elbert Williams, Lynn V. Lawther, E. Glenn Martin, Percy C. Fewell, Jack B. Kirven and Claude W. Trammell, pray that this Honorable Court will refuse to assume jurisdiction in this case and that the Appeal will be dismissed and in the alternative that the Judgment of the Court of Civil Appeals of Texas in this case will be affirmed.

Respectfully submitted,

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